164-704

EXTRACTS FROM TRANSCRIPT OF RECORD.

164-704

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 477.

ADOLPH KRUG, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

RECORD FILED MARCH 25, 1896.

(16,239)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 5, 1896.

1 In the Supreme Court of the United States, October Term, A. D. 1896.

ADOLPH KRUG, Plaintiff in Error,
vs.
THE STATE OF WASHINGTON, Defendant in Error. } No. 477.

It is hereby stipulated and agreed by and between the counsel for the parties in this cause that the indictment, demurrer to indictment, and order overruling the demurrer and the exception to said ruling, the judgments of the trial court and of the supreme court of the State of Washington, the writ of error, and the assignment of errors only shall be printed as the record herein, and that the same shall be taken and considered as sufficient for the purposes of presenting, arguing, and deciding all questions raised in the motion to dismiss the writ of error herein made and filed by defendant in error in said cause.

ADDISON W. HASTIE,
Att'y for Def't in Error.
HENRY E. DAVIS,
In Behalf of —— ——,
Att'y for Pl'ff in Error.

JOS. SHILLINGTON, *Of Counsel.*

Dec. 5, 1896.

2 [Endorsed:] Case No. 16239. Supreme Court U. S., October term, 1896. Term No., 477. Adolph Krug, pl'ff in error, *vs.* The State of Washington. Stipulation to print parts of record. Filed Dec. 5, 1896.

3 In the Superior Court of the State of Washington for King County.

THE STATE OF WASHINGTON, Plaintiff,
vs.
ADOLPH KRUG & HENRY FUHRMAN, Defendants. } 864. Indictment.

Adolph Krug and Henry Fuhrman are accused by the grand jury of the State of Washington in and for King county, said State, by this indictment of the crime of using public money in order to make a profit out of the same and for purposes not then and there authorized by law, committed as follows:

That on the 2nd day of July, 1892, the said Adolph Krug then and there being and at said time was a city officer, to wit, the duly elected, qualified, and acting city treasurer of the city of Seattle, in the county of King, State of Washington, and being then and there charged under the provisions of the charter and the amendments thereto of the said city of Seattle, the said charter being commonly

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ADOLPH KRUG, Plaintiff in Error,
vs.
THE STATE OF WASHINGTON, Defendant in Error. } No. 477.

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known as the freeholders' charter, with the receiving and safe keeping of all moneys belonging to and the property of the said city of Seattle, the said city of Seattle then and there being a municipal corporation duly organized and existing under and by virtue of the laws of the Territory, now State, of Washington, and as such officer and city treasurer as aforesaid the said Adolph Krug was then and there by virtue of his said city office entrusted with the sum and amount of ten thousand dollars ($10,000.00) in lawful money for safe keeping, the same being public money belonging to and the property of the said city of Seattle, and which said money was
4 under the care, custody, and control of the said Adolph Krug as such officer and city treasurer as aforesaid, and the said Adolph Krug, officer and city treasurer as aforesaid, on the 2nd day of July, 1892, in said King county, State of Washington, unlawfully, feloniously, and in a manner not authorized by law, did use the said ten thousand dollars ($10,000.00), public money as aforesaid of the value of ten thousand dollars ($10,000.00), in lawful money, in order to make a profit out of the same and for purpose then and there not authorized by law; and the said Henry Fuhrman then and there at the time aforesaid the said Adolph Krug in the manner and form as aforesaid unlawfully and feloniously did aid, counsel, abet, and assist, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Washington.

Dated at Seattle, in county and State aforesaid, this the 23rd day of October, 1893.

JOHN F. MILLER,
Prosecuting Attorney.

Witnesses Sworn and Examined Before the Grand Jury on Finding the Foregoing Indictment.

James H. Woolery.	J. T. Ronald,	voluntary statement.
J. M. Quilter.	David T. Denny,	"
F. S. Musseter.	B. R. Wilber,	"
J. M. Carson.	L. H. Griffith,	"
Andrew Blackistone.	L. B. Hart,	"
E. O. Graves.	Annie Wilson,	"
John J. Knoff.	J. J. Burns,	"
Frank Crawford.	Henry Fuhrman,	"
T. M. Daulton.	L. D. Ross,	"
George J. Stoneman.	Alfred N. Marion,	"
A. M. Brookes.	Fred. E. Sander,	"
A. L. Parker.	J. F. Blackistone.	
I. P. Taylor.	L. C. Gilman.	
J. M. Lyon.	Max Muller.	
T. J. Carle.	J. F. Hale.	
R. R. Spencer.	C. B. Bagley.	
N. H. Latimer.	H. W. Wheeler.	
F. W. Trounce.	Harry Watson.	
T. F. Quirk.	E. W. Price.	

J. B. MacDougall.
W. L. Ames.
William C. Newman.
A. Chilberg.
F. B. Goldwater.
Nels Anderson.
J. Furth.
William H. Graff.
David E. Durie.
F. H. Baker.
J. S. Kloeber.
J. C. Whitlock.
Conrad Schmitt.
William Rittenhoff.
J. B. Denny.
Andrew Hemrich.
G. H. Tarbell.
J. W. Bixby.

(Endorsed:) A true bill. A. T. Van DeVavter, foreman of grand jury. Indictment for using public money in a manner not authorized by law. Presented to the court by the foreman of the grand jury in open court in the presence of the grand jury and filed Oct. 30, 1893. T. W. Gordon, clerk.

In the Superior Court of the State of Washington in and for the County of King.

STATE OF WASHINGTON, Plaintiff, *vs.* ADOLPH KRUG and HENRY FUHRMAN, Defendants.	No. 864. Demurrer to Indictment.

Comes now the above-named defendant, Adolph Krug, by his attorneys, L. C. Gilman and Charles F. Fishback, and demurs to the indictment herein for that—

I.

Said indictment does not sufficiently conform to the requirements of the code of Washington.

II.

Said indictment charges more than one crime.

III.

The facts charged in said indictment do not constitute a crime.

IV.

Said indictment contains matter which, if true, would constitute a defense and legal bar to said action.

V.

Said indictment does not state facts sufficient to constitute a crime against the laws of the State of Washington.

L. C. GILMAN AND
CHAS. F. FISHBACK,
Attorneys for Defendant Krug.

Due service hereof admitted and a true copy of the enclosed received this 29 day of Nov., 1893.

JOHN F. MILLER,
Attorneys for Plf.

(Endorsed:) Filed Nov. 29, 1893. T. W. Gordon, clerk.

7–9 In the Superior Court of the State of Washington for the County of King.

SATURDAY, *January 20th*, 1894.

THE STATE OF WASHINGTON
vs.
HENRY FUHRMAN. } 864. Demurrer Overruled.

In this action defendant's demurrer to the indictment herein is this day, on consideration thereof, overruled. Defendant excepts, and the exception is allowed.

T. J. HUMES, *Judge.*

45–200.

10 In the Superior Court of the State of Washington for the County of King.

MONDAY, *March 26th*, 1894.

THE STATE OF WASHINGTON
vs.
ADOLPH KRUG, Impleaded with HENRY FUHRMAN. } 864. Motion Denied. Sentence, etc.

And now this cause comes on for further hearing on defendant's motion to set aside verdict and for a new trial pursuant to continuance thereof, the State appearing by the prosecuting attorney, John F. Miller, and defendant appearing in person and by his counsel, Messrs. Lewis, Gilman & Fishback, and now, upon due consideration thereof, said defendant's motion for a new trial is denied; to which ruling defendant excepts, and the exception is allowed. Defendant thereupon moves the court for arrest of judgment; which motion, on consideration thereof, is denied. Exception taken by defendant is allowed.

And now, upon motion of the prosecuting attorney, the said defendant, Adolph Krug, is brought before the bar of the court to be sentenced.

And no legal cause being shown or appearing to the court why judgment should not be pronounced upon the defendant, the court sentences the said defendant, Adolph Krug, to be punished by confinement at hard labor in the penitentiary of the State of Washington for the term of seven (7) years and to pay all costs of this action.

Defendant's counsel thereupon give notice in open court of their appeal from the verdict and the judgment of this court to the su-

preme court of the State of Washington; and the court fixes and determines the amount of defendant's appeal bond in the
11–34 sum of $5,000.00.

Counsel for the defendant excepted to the order and entry upon the journal of the order of Hon. Judge Humes of this date, instructing the clerk to enter upon the records of this court as of date March 3rd, 1894, the request of Judge T. J. Humes to the Hon. James Z. Moore to hold a special session of this court in this county in the place and stead of Judge T. J. Humes; and the exception to the said entry, involving the jurisdiction of the presiding judge in this cause, was allowed.

JAMES Z. MOORE,
Judge Presiding by Request.

45–298.

35–51 In the Supreme Court, State of Washington.

MONDAY, *September 9th*, 1895.

STATE OF WASHINGTON, Respondent,
vs.
ADOLPH KRUG, Appellant. } No. 1706. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of King county, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 9th day of September, A. D. 1895, on motion of John F. Miller, Esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed, with costs, the petition for rehearing denied, and that the said State of Washington have and recover of and from the said Adolph Krug the costs of this action, taxed and allowed at sixty-two & $\frac{15}{100}$ dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

Record, vol. 4, page 152.

52 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the supreme court of the State of Washington (residing at Olympia, Washington), Greeting:

Because in the record and proceeding-, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Adolph Krug, appellant, and The State of Washington, respondent, a manifest error hath happened, to the great damage of the said Adolph Krug, appellant, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid

in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, as shall be ordered by *præcæpe* within sixty days from this date, together with this writ, so that you have the same at Washington city, District of Columbia, on the second Monday of November, 1895, next, or within sixty days from this 12 Sept., 1895, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Washington.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of September, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

The above writ of error is hereby allowed.

——, ——.

[Endorsed:] No. 1706. United States. State of Washington *vs.* Adolph Krug. Writ of error. Filed Sep. 28, 1895. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

53 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceeding- and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between The State of Washington, plaintiff, and Adolph Krug, defendant, a manifest error hath happened, to the great damage of the said Adolph Krug, defendant, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, D. C., together with this writ, so that you have the same at the city of Washington, D. C., within sixty days from the date of this writ, in the said court to be there and then held, that, the record and proceedings aforesaid be inspected, the said court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Washington.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of October, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

A. REEVES AYRES,
Clerk U. S. Circuit Court,
By SAM'L D. BRIDGES, *Deputy.*

The above writ of error is hereby allowed.

——, ——.

[Endorsed:] 1706. United States. Adolph Krug *vs.* State of Washington. Writ of error. Filed Oct. 21, 1895. C. S. Reinhart, clerk.

54 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON, Respondent,
vs.
ADOLPH KRUG, Appellant.
} Assignment of Errors.

Comes now appellant and petitioner, by his counsel, James Hamilton Lewis, and assigns as error committed by the supreme court of the State of Washington against him and to his hurt and damage the following, to wit:

1st. That the said supreme court did, by its final judgment, adjudge that certain law and act more particularly known as section 58 of the Criminal Code of the State of Washington constitutional and valid and as not violating the provisions of section 6 of the Federal Constitution of the United States.

2nd. That the said supreme court of the State of Washington did, by its judgment, hold and decide finally as a final judgment that the said section 58 of the Criminal Code of the State of Washington, herein referred to, was not in violation but in accord with sections 21, article one, of the constitution of the State of Washington; and

3rd. That the said court did, by its final judgment, commit error in deciding that the said section of the constitution of the State of Washington, sustaining and permitting the said section 58 of the Criminal Code, was not repugnant to the Constitution of the United States, and especially of article VI and article fourteen.

4th. That the supreme court of the State of Washington committed error in holding that certain indictment in cause No. 1706, in supreme court, lodged against this defendant under the said section of the said Criminal Code, valid and sufficient, and that the
55 same was good and valid and not in violation of section 6 of the Federal Constitution of the United States.

5th. The said court committed error in sustaining a judgment against defendant, condemning him upon said alleged indictment

to penal servitude in the State penitentiary of the State of Washington.

Wherefore, by reason of the errors herein alleged, petitioner doth assign for correction and hearing and reversal in the Supreme Court of the United States, and petitioner further assigns that the said errors are to his hurt and damage and are prejudicial to his constitutional rights, particularly under section 6 of the Federal Constitution.

JAS. HAMILTON LEWIS,
Attorney for Appellant and Petitioner.

Indorsed: Filed Sep. 12, 1895. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

Endorsed on cover: Case No. 16,239. Washington supreme court. Term No., 477. Adolph Krug, plaintiff in error, *vs.* The State of Washington. Filed March 25th, 1896.

164-704

Supreme Court U. S.
FILED.
OCT 9 1896
JAMES H. MCKENNEY,

164-704

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ADOLPH KRUG, *Appellant,*

vs

THE STATE OF WASHINGTON,
Appellee.

No. 477.

Appeal From the Supreme Court of the State of Washington.

BRIEF OF APPELLANT ON MOTION TO DISMISS.

JAMES HAMILTON LEWIS,
Attorney for Appellant.

J. A. STRATTON,
L. C. GILMAN, *of Counsel.*

QUEEN CITY PRINTING CO. SEATTLE. WASH.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ADOLPH KRUG, *Appellant,*

vs

THE STATE OF WASHINGTON, *Appellee.*

No......

Appeal From the Supreme Court of the State of Washington.

BRIEF OF APPELLANT ON MOTION TO DISMISS.

JAMES HAMILTON LEWIS,
Attorney for Appellant.

J. A. STRATTON,
L. C GILMAN, *of Counsel.*

This cause comes before this Court upon an appeal from the rulings of the state Supreme Court denying the defendant his claim of an immunity and of a right under the Federal Constitution and the laws of the United States, stated as follows:

The defendant is under several indictments charging him with embezzlement. Defendant was the City Treasurer of the City of Seattle and was indicted, as shown by the record, charged with conversion, the

indictment alleging "That he as the treasurer, a city officer, did in a manner not authorized by law, use ten thousand dollars of the money of the City of Seattle in order to make a profit out of the same, to-wit: That he did use the said money with another named Henry Fuhrman in a manner not authorized by law in order to make a profit out of the same," and here the indictment stops.

At the outset it is plain to the court that this indictment states not a fact upon which the defendant could have gone to trial.

It neither states:

1st. What was the manner in which the money was used.

2nd. What was the manner not authorized by law.

3rd. What was the manner authorized by law.

4th. For what was it he used it.

5th. What was the use.

6th. In what way he was to make a profit out of the same or what profit, if any, was made out of the same.

7th. Or that he did make a profit out of the same; nor any other fact or facts showing the nature of the cause of the accusation.

The indictment rests upon Section 57 of the Code of Washington, Volume 2, reading as follows:

"If any state, county, township, city, town, village or other officer elected or appointed under the consti-

tution or laws of this state, court commissioner, or any officer of any court, or any clerk, agent, servant, or employee of any such officer, shall, in any manner not authorized by law, use any portion of the money entrusted to him for safe keeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary not less than one nor more than ten years."

And the form of this indictment is justified by the provisions of Section 58 of the Code, reading as follows:

"In prosecutions for the offenses named in the next preceding section, it shall be sufficient to allege generally, in the information or indictment, that any such officer, court commissioner, clerk, agent, servant, or employee has made profit out of the public money in his possession or under his control, or has used the same for any purpose not authorized by law, to a certain value or amount, without specifying any further particulars in regard thereto, and on the trial evidence may be given of all the facts constituting the offense and defense thereto."

This latter section, it is plain, assumes to authorize the State to put a man upon trial for so great an offense, infamous in its nature, by the mere statement that he did use money for a purpose not authorized by law and assumes to exempt the necessity of specify-

ing any facts which would go to show the nature or the cause of the accusation or any of the acts constituting the offense; and is at direct variance with Article 6 of the Federal Constitution, in conflict therewith and against and in conflict with and in violotion of the provisions generally of the Code prescribing that:

The information or indictment must be direct and certain as regards:

1st. The party charged.

2nd. The crime charged.

3rd. The particular circumstances of the crime charged, when they are necessary to constitute an offense.

See Section 1236 of the Code of Washington.

But as more particularly prescribed in Section 1234 of the Code, reading as follows:

"The indictment or information must contain.—1. The title of the action. specifying the name of the court to which the indictment or information is presented, and the names of the parties; 2. A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

Here we note that there must be a statement of the *acts constituting the offense*, etc.

We contend that under the decision of the Supreme Court of this State in.

The defendant is denied:

1st. His rights under the constitution of the United States.

2nd. His rights under the laws of the United States.

3rd. That these rights, claimed by him in the lower court, intermediate court and the Supreme Court of the State, were decided against him; and a federal right as so claimed decided adversely to him; and we submit that such decision gives him a right to appeal to this court, for the following reasons:

1st. He was entitled to an indictment which would be good under the form and the spirit of Article 6 of the Federal Constitution, because his rights as a citizen of the United States which gave him those benefits were continued in force for him by the act of Congress admitting the State into the Union, and prescribing that this constitution should not in its provisions be "repugnant or inconsistent with the provisions of the Federal Constitution." Therefore, that any constitutional provision which would justify legislation in this form would be violative of that act of Congress and violative of the constitution of the United States.

2nd. That the act of the state legislature as contained in section 58 of the Code of Washington, heretofore cited, as applying to this defendant, is in direct

conflict, directly at variance with Section 1236 and Section 1234, heretofore cited, and creates a special exemption and discrimination against this defendant as compared with the rights and privileges created by the state as to all other persons charged with any offense, the right to have the indictment set forth specifically the nature and cause of the accusation and to directly set forth the acts constituting the offense, while as to him this right, this privilege and this immunity is denied him by the said section 58 of the law of 1891 of the State of Washington. Thus he is denied privilege and immunity under the law and discriminated against in the offense with which he is charged and is not allowed the equal right and the equal privilege of other citizens of the State as to any offense with which they may be charged or as to the manner of his prosecution and the proceedings and conduct of his trial.

2nd. We insist that when the State of Washington was admitted to the Union certain restrictions and limitations were placed around her admission; and, among other things a direct agreement made between the state and the Federal government that should the Federal government take her into the Union she would continue the right of citizens in so far as the same was then prescribed by the United States constitution to the then existing Territorial citizens and continue them in force in the same manner. In other words, that they should not be diminished or

lessened in any degree from that which was possessed by them as citizens of the United States under the territorial government; and to this end the enabling act of the State of Washington prescribes:

"The Constitution (of the State of Washington) shall be republican in form * * * and not be repugnant to the Constitution of the United States."

That is to say: No part of the Constitution of the State of Washington shall be repugnant to any part of the Federal Constitution upon the same question.

It is clear that it was the object to avoid in admission of these new States, the conflict which had previously arisen under certain claims of State sovereignty and equal footing, etc. And in

Section 8 of the enabling act the further words are found:

"If the Constitution * * * is republican in form and if the provisions of this act have been complied with, the said Constitution shall be accepted" etc.

See Sections 4 and 8 of the enabling act admitting the State of Washington.
Acts of Congress, February 22, 1889.
Statutes at Large, 1889, *page* 676.

However, the Constitution of the State of Washington, in violation of this direct inhibition, provided further

"Offenses heretofore required to be prosecuted by indictment may be prosecuted by information * *

as shall be prescribed by law."

Sec. 25, *Article* 1 *State Constitution.*

This is the warrant for the law permitting this defendant to be arraigned for his life upon an information. As before shown, the defendant was entitled to be arraigned by a grand jury under the Federal Constitution.

Sec. 1, *Article* 5.

That it is apparent that the State Constitution in this regard permitting the defendant to be so arraigned for his life without a grand jury is "repugnant" to the Federal Constitution can not be denied. It is clearly inconsistent, it is clearly contrary to the provisions and guarantee of the Federal Constitution granting immunity from such prosecutions in such manner to the citizen.

"Repugnant" as used in the act of Congress, referring to the Constitution of future States, has been defined as follows:

"*Inconsistent; Contrary to*"
See "*Repugnant*" *Anderson's Dictionary.*
Texas vs. White, 7 *Wallace* 728.

Now here this repugnancy of our constitution is apparaent and is irreconcilably in conflict with the said subject of the Constitution of the United States, the Constitution of Washington in that respect and legislation under it must fall or be treated as subordinate, by reason of the contract of our admission, agreeing that the Federal constitution shall be super-

sior, and by the further reason of the United State recognizing the Federal Constitution as the supreme law of the land.

Niell vs. Delaware, 103 *U. S.*, 370.
Ham vs. Missouri, 18 *How.* (*U. S.*) 131.
Beecher vs. Weatherby, 96 *U. S.*, 517.
New Orleans vs. U. S., 10 *Peters*, 731.
Glasgo vs. Parker, 128 *U. S.*, 575.

If it be said that the Federal Constitution is but a limitation upon the Federal government and not upon the State, then it is answered that the state in this case has made the *Federal Constitution its own limitation*, and disposes by reason of the adoption of the terms of the enabling act of any merit to the distinction preveiously obtaining.

And while it may be true that as to property there may be a segregative interest, the Federal government being permitted to take property in a certain way for its use, and the State to take part of the said property for its use, or both use the same property for their respective uses, here the provision of the one goverment may apply free from the other, because of segregative interests of the property *but this is without its application when* referred to the life of the citizen. When the State of Washington takes the life of the citizen because a citizen of the State, she leaves nothing of the life of the citizen of the United States. His rights under the Federal Constitution are specially preserved to him as such citizen of the Federal gov-

ernment.

See Constitution and enabling act cited and authorities.

Cooley Const. Limitations, pp. 246 *and* 247.

Paine vs. Virginia, 8 *Wallace*, 180.

Twichell vs. Commonwealth, 7 *Wall*, 321.

Webster vs Reid, 11 *How*, 437.

Reynolds vs. U. S., 98 *U. S.*, 154.

Callan vs. Wilson, 127 *U. S.*, 540.

Hennon vs. Gilmer, 131 *U. S.*, 22.

Therefore, where the Federal Constitution applies at the time of legislation of a State inconsistent therewith, or the existence of a constitutional provision in the State inconsistent therewith, then the rights of the individual under the Federal Constitution having first obtained or having first been recognized by the State as such in subsequent constitutional provisions or legislation of the State (inconsistent therewith), such State provision is invalid and inoperative and as respects matters provided in the fourteenth amendment and in the fifth amendment, article 1, the said provisions are wholly void.

Owen vs. Speed, 5 *Wheaton*, 420.

Scott vs. Jones, 5 *Howard*, 343

Niell vs. Deleware, 103, *U. S.*, 370.

Water Power Co. vs. Green Bay Canal Co., 142 *U. S.*, 254.

Here the Court say:

It is argued by the defendant that the act of the

legislature complained of was enacted in 1848, and the fourteenth amendment to the constitution was not adopted until 1868, and was inapplicable * * * * * but it appears that the beginning of the taking of the property and the taking of the same was after the the adoption of the fourteenth amendment, though assumed under the law of 1848 * * * The Company gave notice, not until 1880, that they would take this property * * * and that they claimed exclusive rights. *This may be considered a deprivation within the meaning of the amendment.*

Nor can it be urged that the repugnancy in the State Constitution was a known matter when the state was admitted and this was adopted as an amendment to the enabling act, as has been suggested by the State.

1st. No amendment could be made to that act but by Congress. It was a legislative function.

2nd. The admission by the President of the State and the failing to object to this repugnancy was but a negative act of the executive, who was powerless to either amend or reject the provisions of the enabling act. This was decided in the Supreme Court of the United States in the Rauscher case, holding that President Pierce could not amend a treaty made with Spain and the United States Senate.

See Rauscher case

This is held in the Supreme Court of the United States refusing to confirm President Grant's treaty or

submitted arrangement over the Cuban trouble, on the ground that it was legislation or treaty matter not within the sole power of the executive.

This is held as late as 1891 and 1892 by the Supreme Court of the United States as regards the reciprocity clause of the McKinley act. Where they hold that if this reciprocity act vesting in the President the privilege of its enforcement was intended to give him *the right to legislate by declaring whether it exists or does not exist* as a process of legislation, the law would be *utterly void;* but construing it as giving the President but the right of saying when and to whom the law should apply, it was sustained on the ground that it but permitted him to name the time and place of enforcement. The law in its entirety being made by Congress.

See Marshall Field vs Collector et al 141, 142, 146 *U. S.*

Lippman et al vs Hedden, same case.

If it be insisted, however, that the President would have the authority of Congress in this matter, then it is contended here that even Congress by its acceptance of the State Constitution by any act of Congress could not have condoned the repugnancy of the two constitutions so as to have avoided the consequences of their confliction, or have rendered the provision in the Federal Constitution subordinate to that of the State. This question is absolutely met and decided in

Barry vs Gunn, 15 *Wallace*, 610, 624.

Say the court:

Section 10 of article 1 of the Constitution of the United States declares "no state shall pass any law impairing the obligation of contracts." Under the Constitution of Georgia she took to herself the right of practically nullifying contracts previously made. Say the Supreme Court: "Though her constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permitted as part of the process of her rehabilitation and involved nothing affirmative or negative beyond that event. If it were express and unequivocal the result would be the same. *Congress cannot by authorization or ratification give the slightest effect to a State law or constitution in conflict with the Constitution of the United States.* The legal remedies for the enforcement of a contract a state may change, provided they involve no impairment of a substantial right. If the provision of the constitution or legislative act of the State (thereunder) fall within the category last mentioned, *they are to that extent* utterly void. They are for all the purposes * * * as if they had never existed."

Hoffman vs Quincy, 4 *Wall.* 535.
White vs Hart, 13 *Wall.* 646.
Gunn vs Barry, 15 *Wall. cited.*

Surely then the President could not do as regards a legislative function what Congress assembled could not accomplish.

The President is inhibited from doing any of the acts the duties of which devolve upon Congress.

Art. 11, *Sec* 2.

Kendall vs U. S., 12 *Pet.* 523

Marbury vs Madison, 1 *Cranch*, 137

Holding: "The President cannot control a statute, nor dispense with its execution, nor authorize the secretary to omit the performance of any act enjoined by law."

But if it be taken that the latter positions are untenable and that the President could accept the Constitution as an amendment to the enabling act the same as Congress, then we must treat the matter as regards the repugnancy as suggesting to the Presidency only such modifications as on its face it seemed to bear.

The clause is:

"Offenses heretofore prosecuted by indictment may be prosecuted by information * * * as *shall be provided by law.*"

We must construe this as meaning as shall be provided by law in harmony with what had been provided by law and held to be only legal provisions that the law in such cases could make. That is, the President must have understood this to mean prosecutions by information in such cases *as could* be provided by law. This had previously been decided by the Supreme Court of the United States to mean offenses which were not odious, to-wit; Misdemeanors punish-

able by fine, and these only.

In re Wilson, 114 *U. S.*

In re Mackin, 126 *U. S.*

In re Palsier, etc. 143 *U. S.*

It therefore cannot be assumed that the words—as shall be provided by law—could have indicated to the President that an attempt would be made to provide by law that which had been declared by law illegal, but only such matters as could *legally be provided by law.*

See U. S. Const., Art. 6.

Ellison vs Hanshaw, 4 *Wheaton*, 225.

Chicago vs Denver R. R., 143 U. S. 596.

Louisiana vs Meyer, 109 U. S., 288.

Spies vs U. S., 123 U. S. 131.

Especially must this by true where the United States Constitution had expressly enacted:

That no State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States.

See Art. 6 U. S., Const.

Reynolds vs U. S., 98 U. S., 154.

Therefore we take it that the law permitting informations by which one can be arraigned in a capital case is contrary to the State Constitution recognizing the Constitution of the United States as supreme, is *contrary and repugnant* to the Federal Constitution.

Article XIV., Sec. 5.

Is contrary to the enabling act.

Secs. 4 and 8.

And is therefore void and inoperative.

It is contended that because the Constitution of the State of Washington prescribes that the defendant may be presented for his life upon an information, that such gives authority so to do.

See Constitution of the State of Washington. Section 25.

Code of Washington, Vol. 2 page 814.

And that by virtue of such provision, the legislalature has prescribed the method for so doing and that under this method the same has been done.

3rd. We insist that the enabling act requiring the Constitution of the State of Washington to be consistent and "not inconsistant and not repugnant to the Federal Constitution" was to avoid this very confusion and was a grant to the citizen of the territory or future state that his rights were the same —were the same rights as a citizen of the United States as of the state: That is to say, as to life and liberty; for here it will be observed that the life of the citizen of the State of Washington cannot be taken without the taking of the life of the citizen of the United States. We insist that the very object of the act was to protect the citizen in so far as his rights as a citizen of the United States were concerned, from having them taken or curtailed or being proceeded against in any manner than that which was his privilege as a citizen of the territory and a citizen of the United States

under the Federal Constitution. That by reason of this compact between the Federal government and himself to admit the state into the Union upon such terms, he voted to accept the act and to pass into the Union under its privileges. To now permit the state in its constitution to make a provision, and the state after its admission to make legislation directly inconsistent and repugnant to such provision of the Federal Constitution as a citizen assumed he was protected under and were extended to him by the form of submitted admission, is to permit the state to violate the right of that citizen as guaranteed him as a citizen of the United States under the Federal Constitution and also to violate a right guaranteed him under the laws of the United States, to-wit: The act of Congress heretofore referred to.

We insist that the rule is that:

*If any right, privilege or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States have been denied by a refusal of the State Court to set aside either the indictment * * * or by any erroneous ruling in the progress of the trial, his remedy is through the revisory power of the highest Court of the State and from that court by a due appeal to the Supreme Court of the United States" "Such refusal and erroneous ruling creates in the law a Federal question and establishes the jurisdiction of the Court to hear the cause upon its merits."*

Gibson vs State of Mississippi, 16 *Supreme*

Court Reporter, No. 27, *page* 907.

Sustained by the previous announcement to the same effect in:

Virginia vs. Reeves, 100 *U. S.*, 313.
In re Wood 140 *U. S.*, 278.

We further insist that the rights of the defendant as claimed here by him are protected under the fourteenth amendment of the Constitution. For that, if the State through its legislation can abridge his privileges and immunities as a cititzen of the United States in the protection of his life and thus deprive him of that life without that due process of law which was prescribed for his benefit and avoid its uniform application, the State would thus be permitted to violate the Constitution and deprive him of a Constitutional right as such citizen.

Re Converse, 137 *U. S.*, 624.
Caldwell vs Texas, 137 *U. S.*, 692.

4th. It appears by the record in this case that the Federal rights and Federal exemption here claimed were set up:

1st. By demurrer in the Superior Court; then plead by special plea in the Superior Court; after conviction was raised on a motion in arrest of judgment and taken to the Supreme Court of the State and in all instances decided adversly to the defendant and had such decision been in his favor by decisions on other points adverse, this would have nevertheless and notwithstanding entitled him to what he claimed

—a re-trial by proper process.

Thus the Federal question decided adversely to him is the direct and independent occasion of his present sentence.

This Court has said:

"No State can deprive a particular person or class of persons of equal and impartial justice under the law * * * The power of the statement must be exerted within the limits of these principles; and a judgment cannot be sustained when special, partial and arbitrary."

Caldwell vs The State, 137 *U. S.*, 691.

Here the Court says: a negative assertion—

"Had the defendant claimed a right, privilege or immunity under the Constitution of the United States at the outset of the case, such being shown as having been raised in the intermediate and Supreme Courts of the State, it would be heard and passed upon by the Supreme Court of the United States."

Here we call attention to the separate opinion of Mr. Justice Dunbar of the Supreme Court of the State of Washington in this case, expressing a doubt as to whether the evidence showed the defendant guilty and as to whether the proceeding was strictly legal. This doubt coming from the Court, should have been sufficient to have awarded the defendant a reversal. We submit the conclusions to the consideration of this Court in considering the application here made.

State vs Nordstrom, 7 *Washington Rep.* 506

We insist that as the record discloses a denial of a right to the defendant established for him by the laws of the United States—the act of Congress admitting the State to the Union and the Constitution of the United States referred to in the act—and that he claimed such all through the proceedings, vests this Court with the right to hear the cause and to ascertain what rights under the Constitution and laws he has; and then, upon the merits to say whether or not such right does not establish a privilege in him personally to claim exemption from being placed on trial for his life by a process contrary to that prescribed by the Constitution of the United States as a right if all such rights were continued in his behalf by the act of Congress creating him a citizen of the State of Washington and of the United States conjunctively.

McKane vs Dunston, 153 *U. S.*. 684.

Particularly where the claim is that the State by legislation establishes a right in behalf of the State against the individual where the individual claims his right from an act of Congress or by the Constitution, such conflicting claims, if they arise out of a mere reading of the law, make a Federal question and justifies this Court to enter into the merits, taking jurisdiction to ascertain whether the letter of the law justifies the claim of the defendant. This becomes the question on the merits after the jurisdiction is obtained because of the apparent inconsistency or re-

pugnancy of the different provisions of the different provisions of the different laws of the different sovereignties.

We think this is a fair statement of the rule laid down by this Court upon such points in,

Schiveley vs Bowlby, 152 *U. S., Page 1* where the Court states:

"A state judgment reciting that a grant passed no title or right, as against a subsequent deed from the State in lands below high water mark, presents a Federal question within the appellate jurisdiction of the Supreme Court of the United States."

To the same effect:

Powell vs Brunswick, Supervisors 150 *U. S.*, 433.

Mobile & O. Railroad Co. vs Tennessee, 153 *U. S.*, 486.

The real test of the question as has been established by this honorable Court is as follows:

"Where it appears that some title, right, privilege or immunity on which a claim depends will be defeated by one construction of the Constitution *or of a law of the United States*, or sustained by an opposite construction, the cause is one arising under the Constitution or laws of the United States."

Cook vs Avery, 147 *U. S.*, 375.

Following the dicta in

McPherson vs Blacker, 146 *U. S.*, 1.

Boyd vs Nebraska, 143 *U. S.*, 135.

These views were practically announced by this court in

O'Neil vs Vermont, 144, *U. S.*, 323.

The Court holding, however, that the facts in that case did not bring it within the rule of the law.

We respectfully submit that a Federal question is fully raised and fully sustained under the rulings of this Court as shown by the record in the cause at bar.

We insist that under Section 6 of the Federal Constitution this defendant was entitled to have an indictment describing the nature of the offense with directness and certainty, as a Citizen of the United States as well as a citizen of the State of Washington.

Here we invite attention to the decision of the Supreme Court of the State, to the reasoning of the Court, Mr. Justice Dunbar rendering the opinion:

State vs Krug, 12 *Wash.* 288.

And to the dissenting opinion; and we now urge that this provision of the Federal Constitution cannot be violated in the manner attempted by the legislature of the State.

See Cruikshank vs The United States, 92 *U. S.*, 542.

Nor can a man be placed on trial by any State in such a manner as shall deny him a Constitutional right as a citizen of the government, State or Federal. That is to say, it is not in the power of the State to put him on trial in contravention and in direct violation of the very fundamental rights of citizenship and of

the freeman as established by the charter rights and theories of this government. Otherwise, why not carry it to its logical and prescribe that he need not be arraigned at all upon anything if the thing upon which he is arraigned means nothing in its manner of construction.

No form of indictment or presentment from any State or the Union has ever been sustained by this Court or any other Court recognizing the fundamental provisions of a Constitutional government, where the same has been looked into, and similiar in form to the indictment under the present provision of the law.

That the same is violative of the Constitution of the State of Washington is shown by Section 22, article 1, which reads as follows:

"In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him * * *"

And is violative of Section 6 of the Federal Constitution of which said Section 22 is but a copy; and it cannot be urged that the legislature of the State could give the right to arraign a man in a manner so contrary to all natural rights of such man as a citizen of a Constitutional government and so violative of every theory of the charter rights of the free citizen.

These views have been clearly suggested, if not announced, and firmly sustained by the rulings of this Court in many cases, among which the following are

at least suggested for their number and their force.

Denial of equal rights and privileges under the law.

We further insist that the law under which this defendant was arraigned is violative of the United States law prescribing that no citizen shall be deprived of a right, privilege or immunity which is guaranteed generally to citizens in his respective government.

Here we urge that the general law of the State of Washington gives to all citizens the right to be arraigned upon a presentment or information which shall state with clearness and directness the nature of the accusation, the act constituting the alleged offense; but as to this particular defendant and citizens who shall be charged with an offense under this particular law, or with this particular kind of offense, they are not to be entitled to the same privileges of such statement of the nature of their alleged offense that they may prepare to defend themselves. They are not permitted the same rights and the same privileges of having the acts set forth with preciseness in order that they may prepare to meet them and defend against them.

As to this class of men who may be brought within such law, clearly there is a discrimination by the law which is contrary to the Constitution and a denial of equal rights and equal privileges which is clearly violative of every theory of uniformity and univer-

sality in the law, and creates a special immunity as to one class of citizens as respects their liberty and denies it to another.

It cannot be answered that such law is general as to the class that may come under it, and therefore sufficient. It has been attempted too often in this Court as an excuse for discriminating and individuating legislation; and to illustrate what such an argument would mean, I use an illustration of the former class of cases brought before this Court. Supposing a law prescribes that indictments or informations arraigning a citizen should contain the nature and cause of the accusation, should be direct and certain as to the crime charged, "should state the facts constituting the same" and added, but as to Negroes or Chinese, they may be arraigned upon indictments or presentations which do not state the nature or the acts constituting the offense or be direct or certain as to the offense charged. Would not such be obnoxious to the general cardinal principles of the law granting to citizens equal rights, equal immunities and equal privileges under the law, though it may be general as to Chinese citizens or to Negro citizens.? This Court would not tolerate such an answer; and we think that the very statement of the situation as an illustration of its effect is sufficient to sustain the point raised and that it should be at once sustained by this Honorable Court and this legislation held to be invalid, oppressive, unconstitutional and the defendant denied his

Constiutional rights upon all of the reasons heretofore stated and particularly this latter ground.

Re Bonner, 151 *U., S.*, 242.

Particularly say this Court in the late case of

Post vs the United States, 161 *U. S.*, 583, *referring to an act operating similarly to the one at bar:*

"In all cases where life or liberty is affected by the proceedings of the Court, it must be kept strictly within the limits of the law authorizing it to take jurisdiction and try the cause. It cannot pass beyond those limits in any essential requirement in either stage of the proceedings, and its *authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms.*"

That the defendant in this form of procedure, such as was taken against him, is denied the equal protection of the laws is clear by the manner of his indictment and the very reading of the special statute which prescribed that he shall not have the benefit of other citizens indicted for felonies or infamous offenses.

The fourteenth amendment to the Constitution reads that "No person * * * shall be denied the same protection of the laws which is enjoyed by other persons under the laws."

Missouri vs Lewis, 101 *U. S.*, 22.

Further, the provision in the Constitution that "No State shall deny to any person within its juris-

diction the equal protection of the laws" is, upon the very face of this record, openly and flagrantly violated by the State denying to this defendant in the prosecution for this alleged felony the equal protection of the general law applying to any other person prosecuted for felonies and also of the Constitutional right given to other persons prosecuted for felonies.

We think this rule is amply elaborated by this Court in the Slaughter House cases.

16 *Wallace*, 72.

And arose from the fundamental doctrine laid down in

Bank vs Oakey, 4 *Wheaton*, 244.

And followed with full elaboration in those now historic cases beginning with

Munn vs Illinois, 94, *U. S.*, 125.

This Court has held that by the fourteenth amendment "The powers by the States in dealing with crimes within their borders are not limited *except* that no state can deprive particular persons or classes of persons of equal and impartial rights under the law * * * and that due process is only secured by the law operating on *all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice.*"

Hurtado vs California, 110 *U. S.*, 516.

Baldwin vs Kansas, 129 . *U S.*, 52.

And particularly referred to and recognized in

Leeter vs Texas, 139 *U. S.*, 417, 438.

This Court has specifically stated, recognizing these rules, that *legislation cannot abridge* a constitutional privilege and cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect of recognizing and replacing the Constitutional privileges taken away, by a method clearly as broad and as beneficial as that which is assumed to be abridged or denied.

Counselman vs Hitchcock, 142, *U. S.*, 547.
Cole vs Cunningham, 133 *U. S.*, 107.
Lawton vs Steele, 152 *U. S.*, 133.

We beg here to commend to the Court's attention the application of the facts of this case to the reasons offered in

Mett vs McGuckin, 148 *U. S.*,
Chicago & N. W. Ry. Co. vs McGaukin,
119 *U. S.*, 566.

We respectfully urge that for the reasons herein stated this case is clearly before the Court as being sustained in its claims for a Constitutional privilege, for a right under an act of Congress and is also before this Court upon a Federal question involving substantial rights under the Constitution of the United States, and this because:

1st. Appellant has been denied equal privileges and immunities under the law.

2nd. That the State has assumed to pass a law denying him equal protection with other citizens under the law.

3rd. That it has violated a right given him by an act of Congress as heretofore shown.

4th. Denied him a benefit under Article 6 of the Constitution of the United States.

We respectfully submit that the motion to dismiss this cause for want of jurisdiction should be denied.

Most respectfully submitted.

JAMES HAMILTON LEWIS,
Attorney for Appellant.

J. A. STRATTON,
L. C. GILMAN, *of Counsel.*

164-704

164-704

IN THE

SUPREME COURT

OF THE

UNITED STATES

ADOLPH KRUG,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON,
Defendant in Error.

No. .....

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

JAMES HAMILTON LEWIS,
Attorney for Plaintiff in Error.

NEWMAN & MOULTON, PRINTERS, SEATTLE, WASH.

IN THE

SUPREME COURT

OF THE

UNITED STATES

ADOLPH KRUG,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON,
Defendant in Error.

No. .....

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING.

Comes now the plaintiff in error and petitions the court for a rehearing in the above entitled cause upon

AN OVER-LOOKED POINT.

Petitioner begs to impress upon the court's attention that the court was unconsciously misled by a statement made by the counsel for the respondent

in stating as he did that the Krug case, to-wit, number....., involved the same point as the Nordstrom case, to-wit, number.....

This court took that view and singularly has dismissed the Krug case because the point involved had been disposed of in the Nordstrom case.

We beg to impress upon the court that while it is true one of the points in the Krug case was the same as raised in the Nordstrom case, yet *the main point in the Krug case is the validity of the State Act*, questioned on the ground that it

DENIES EQUAL PRIVILEGES AND IMMUNITIES UNDER THE LAW.

The point being, as appears from the brief, page 24, that the legislation refused to Krug the same rights and privileges any other citizen of the State of Washington indicted for criminal or like offenses would have.

We beg now to call the court's attention that the second point, stating that the legislation of the State of Washington specifically discriminates against persons charged as Mr. Krug was charged, denying him the privileges of the Constitution of the United States and of the State of Washington in the particulars pointed out in the brief, is the main point upon which the Krug case should rest for its jurisdiction before the court.

That the same has evidently been overlooked, as the point is made clearly within the decisions of this court, as pointed out in the brief, pages 26, 27 and 28.

We beg to call the court's attention that it will look to the brief and upon this main point ascertain whether it has not inadvertantly decided no jurisdiction, for the reason that this question was overlooked, and cite the late case of

Trega vs. Board. Etc., October term, 1896,
November 16, 1896.

And for the further reason that the brief, in the haste of printing, fails to put under several heads the second point.

We respectfully petition the court for re-hearing and re-consideration of the Krug case upon this point, as we feel the same would entitle the petitioner to a re-hearing and re-consideration of the merits of his cause.

We submit the authorities which are set forth in the brief beginning with page 26 and continuing to page 29, as applicable to this point, and ask that they be considered by the court in support of this petition for re-hearing.

Most respectfully submitted,

JAMES HAMILTON LEWIS,
Attorney for Plaintiff in Error.

164-704

FILED.
OCT 7 1896

IN THE

SUPREME COURT

164-704

OF THE

UNITED STATES.

October Term, A. D. 1895.

1896

ADOLPH KRUG,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON
Defendant in Error.

No. 918.

477

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS FOR WANT OF JURISDICTION.

ADDISON W. HASTIE,
Attorney for Defendant in Error.

JOSEPH SHILLINGTON,
Of Counsel.

NEWMAN & MOULTON, PRINTERS, HINCKLEY BLOCK, SEATTLE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. ~~1895~~ 1896.

ADOLPH KRUG,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON
Defendant in Error.

No. ~~918~~ 477.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Now comes the State of Washington defendant in error, by its attorneys, and moves the court to dismiss and set aside the writ of error herein, and all proceedings taken by the plaintiff in error thereunder.

In support of this motion the defendant in error respectfully represents to the court.

STATEMENT OF THE CASE.

The plaintiff in error, Adolph Krug, city treasurer of Seattle in the State of Washington, on October 30th,

1893, was indicted by the grand jury for the crime of using $10,000 public money, belonging to said city, in order to make a profit out of the same. A demurrer was interposed to the indictment, and after being overruled by the court, the defendant was tried by a jury, and convicted of the offense as charged, and was afterwards sentenced to seven years' imprisonment in the penitentiary. Other indictments were also returned against said Krug, charging in all embezzlement and misappropriation of public funds in the amount of about $127,000. An appeal was taken to the Supreme Court of the State and the judgment was by that court in all things affirmed. Upon application of counsel for the accused, the Chief Justice of the Supreme Court of the State of Washington granted a writ of error, citation and order staying all proceedings, and thereupon the case was sent to the Supreme Court of the United States. Upon March 2d, 1896, the plaintiff in error having failed to docket and file the case for six months, the same was docketed and dismissed under the rules of the court, but upon application of counsel for plaintiff in error the case was reinstated.

ARGUMENT.

This motion to dismiss ought to be granted for the following reasons:

I.

The case presents no Federal question for the consideration of the court.

II.

The court has no jurisdiction over this cause and no writ of error should have been granted.

III.

For other good and sufficient reasons appearing on the face of the record.

The defendant was indicted for a statutory offense, under section 57, page 57, 2d Vol. Hill's Code of Washington (Session Laws of 1889), which is as follows:

"If any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this state, court commissioner, or any officer of any court, or any clerk, agent, servant, or employee of any such officer, shall, in any manner not authorized by law, use any portion of the money intrusted to him for safe keeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary not less than one nor more than ten years."

The following section 58 prescribes what shall be a sufficient statement of the facts to be alleged in the indictment, and reads as follows:

"In prosecutions for the offences named in the next preceding section, it shall be sufficient to allege generally, in the information or indictment, that any such

officer, court commissioner, clerk, agent, servant, or employee has made a profit out of the public money in his possession or under his control, or has used the same for any purpose not authorized by law, to a certain value or amount, without specifying any further particulars in regard thereto, and on trial evidence may be given of all the facts constituting the offense and defense thereto."

The counsel for plaintiff in error insists that this statute if enforced, restricts him in his constitutional rights, and that the indictment having been drawn under the form prescribed fails to inform the accused of the nature and cause of the accusation against him. That thereby his constitutional rights have been invaded as guaranteed under Article 6 of the amendments to the Constitution of the United States.

The provisions of the Federal Constitution contained in said Article 6, relating to the rights of the accused, as to the facts to be alleged in indictments, apply only to the practice and procedure in the Federal courts. It has no application to state governments or state courts. This doctrine was laid down by Chief Justice Marshall as early as 1833. In 1868 the question was again squarely raised in Twichell vs. The Commonwealth, 7 Wall., 321, a case similar to the one at bar. In that case the accused was charged with murder and convicted under a form of indictment provided by the legislature of Pensylvania. The court, after reviewing the

earlier decisions, were of the unanimous opinion that no federal question was involved; and that the State of Pennsylvania had exclusive jurisdiction, and the writ was denied.

Twichell vs. The Commonwealth, 7 *Wallace, 321.*
Ex-parte Reggel, 114 U. S., 642.
Baron vs. The City of Baltimore, 7 Peters, 243.
Fox vs. Ohio, 5 Howard, 434.
Smith vs. The State of Maryland, 18 Howard, 76.
Withers vs. Buckley, 20 Howard, 87.
Presser vs. Illinois, 116 U. S., 252.
Pervear vs. Mass., 5 Wallace 475.

It has been claimed by the learned counsel for plaintiff in error, in other cases, and perhaps will be urged here, that the Enabling Act of Congress (February 22nd, 1889,) providing for the admission of the states of North and South Dakota, Montana and Washington into the Union, limited their constitutional power. In other words, it may be contended that Congress has attempted to restrict their right of self-government, and that they are not placed on an equality with their sister states. This contention, if made, will be based on that portion of Section 4 of said Enabling Act which provides that "The constitution (for the new states) shall . . . . . not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence". This language in

the Enabling Act was only intended that the Constitution of the United States should be recognized by the new states. If this law of Congress had attempted to release the new states from constitutional authority, or if it had been silent on the subject, the effect no doubt would have been the same. If it is claimed that Congress has attempted to pass restrictions on these new states, and that they have not been admitted on an equality with the others, then it has exceeded its power. If Congress can control or make a constitution for a state in part, it might, in form of amendment, make it entire. "Congress has no power to impose on any new state, on its admission into the Union, any restrictions or limitations not imposed upon all."

Pollard vs. Hagan, 3 Howard, 312.
Permoli vs. New Orleans, 3 Howard, 589.
Strader vs. Graham, 10 Howard, 82.
Vinie vs. Moore, 14 Howard, 568.
Scott vs. Sanford, 19 Howard, 395.

We do not believe that it was the intention of Congress to attempt any restrictions over these new states. No language can be found in the Enabling Act which does not apply with equal force to every state in the Union.

Wherefore the defendant in error moves this honorable court to dismiss the writ of error herein, and set

aside all proceedings taken by plaintiff in error thereunder.

Addison W. Hastie
Attorney for Defendant in Error.

Joseph Shillington
Of Counsel.

To JAMES HAMILTON LEWIS, ESQ.,
Attorney for Plaintiff in Error:

Please take notice that the foregoing and attached motion to dismiss will be brought on for hearing before the Supreme Court of the United States, in the city of Washington, D. C., on Monday, October 12th A. D. 1896, at twelve o'clock noon of that day, or as soon thereafter as counsel can be heard.

Addison W. Hastie
Attorney for Defendant in Error.

Joseph Shillington
Of Counsel.

Due and timely service of three copies of the within motion and notice is hereby admitted this ____ day of ____, 1896, at Seattle, Washington.

_____

Attorney for Plaintiff in Error.